

CHECKLIST REGARDING THE REVIEW OF MOUs, MOAs, SOIs, & SIMILAR INSTRUMENTS

Introduction

This checklist is intended to assist in the review of agreements such as Memoranda of Understanding (MOU), Memoranda of Agreement (MOA), Statements and Letters of Intent (SOI and LOI, respectively), Joint Statements of Cooperation (JSC), Statements of Principles (SOP), and other similar cooperative agreements that are intended to be primarily aspirational in nature.

For purposes of this checklist, these agreements are referred to generically as “MOUs.”

EPA may engage in such agreements with a variety of entities, including: federal agencies; state, tribal, and local governments; private non-profit or for profit organizations; and foreign governments/entities.

Attorneys in the Office of General Counsel (OGC) and Office of Regional Counsel (ORC) should use this MOU Checklist as general guidance when reviewing MOUs. The Checklist also provides model language for use in an MOU, as appropriate.

If a reviewer has considered the information in the Checklist and still has questions, or if the Checklist does not address an issue, the reviewer should contact the identified OGC point of contact for the issue(s) of concern (see Appendix A for OGC attorney contact information). The reviewer may also contact either the Cross-Cutting Issues Law Office (CCILO) or General Law Office (GLO) MOU point of contact, who will address the issue directly or consult the OGC MOU Review Team, as appropriate (the Team is comprised of attorneys from GLO, CCILO, Civil Rights and Finance Law Office (CRFLO), and the Ethics Program).

The lead OGC/ORC reviewer need not consult the OGC MOU Review Team on all Agency MOUs. However, he/she is expected to contact the Team for every MOU that is to be signed by the Administrator or Deputy Administrator and whenever he/she has determined that an MOU is sufficiently complicated or sensitive to warrant a more comprehensive Agency legal review.

Further, the reviewing attorney is expected to contact the appropriate law office attorney, as identified in the Checklist, in all cases where an MOU involves any one of the following:

- Intellectual property (see Checklist Questions #16-#18): Consult OGC/GLO/IPLPG on all MOUs involving intellectual property considerations.
- Indian tribes (see Checklist Question #4): Consult OGC/CCILO on all MOUs involving Indian tribes.
- International (see Checklist Question #5): Consult OGC/CCILO/IELPG on all “international” MOUs.

- Joint financing by federal agencies of a commission, board or similar organization performing governmental functions (see Checklist Question #14): Consult OGC/CRFLO on all MOUs involving such joint financing.
- Liability (see Checklist Question #15): Consult OGC/CRFLO on all MOUs involving indemnification or hold-harmless provisions or any other provision addressing liability.

When using this Checklist, reviewers should keep in mind that it is intended to serve as general guidance only, and that there may be instances where the approach called for in this checklist does not apply to a particular MOU.

Note that this checklist is not intended for use in reviewing Partnership Program Agreements. These agreements usually involve the use of a partnership program name(s) or logo(s) and, therefore, constitute a distinct category of agreement which necessitates review by OGC General Law Office's Intellectual Property Law Practice Group (IPLPG). Nor is this checklist intended for use in reviewing instruments for which there is a specific legal basis (in statute or regulation) for the document to bind the Agency (e.g., MOAs under Section 128 of the Comprehensive Environmental Response, Compensation, and Liability Act). Additionally, please note that agreements with other federal parties or non-federal parties to jointly sponsor discrete events such as conferences, meetings, exhibitions, and similar events are covered by Ethics Advisory 96-15 and OGC has developed a separate template agreement for them. Regardless, reviewers of such agreements may find some of the information in this checklist useful.

**CHECKLIST:
WHAT TO ASK WHEN PREPARING
OR REVIEWING AN MOU**



- ☐ Is an MOU the appropriate instrument to use to accomplish the Agency's objectives?
See p. 5
- ☐ How should the MOU be titled? *See p. 5.*
- ☐ If the MOU is with another federal agency; a state, tribal, or local government; or foreign government, has the program office coordinated with the Grants or Regional Grants Management Officer? *See p. 5.*
- ☐ Does the MOU involve Indian tribes? *See p. 6.*
- ☐ Does the agreement involve a foreign government or entity or involve international efforts to promote environmental protection? *See p. 6.*
- ☐ Is the purpose of the MOU clearly explained? *See p. 7.*
- ☐ Does the MOU provide the necessary context/background? *See p. 7.*
- ☐ Does the MOU describe EPA's authority to undertake the activities described in the MOU? *See p. 7.*
- ☐ Does the MOU set forth in a clear and concise manner the actions each party intends to undertake pursuant to the MOU? *See p. 10.*
- ☐ Does the MOU contain mandatory language or other provisions that create, or appear to create, binding legal obligations? *See p. 10.*
- ☐ Does the MOU contain the appropriate "no private right of action" language? *See p. 12.*
- ☐ Does the MOU provide for its commencement, duration, modification, and termination? *See p. 12.*
- ☐ Does the MOU purport or appear to obligate funds? Does the MOU provide for compliance with appropriations law and Agency policies relating to competition for grants and contracts? *See p. 13.*

- Does the MOU create the appearance that federal agencies are jointly financing a commission, board, or similar organization to carry out governmental responsibilities? *See p. 14.*
- Does the MOU include an indemnification provision? *See p. 14.*
- Is it possible that the activities described in the MOU may create or affect rights in intellectual property? *See p. 15.*
- Does the MOU authorize, or imply, that a party may use the EPA seal or identifier (logo)? *See p. 16.*
- Does the MOU authorize a party to use a program name or logo used by the Agency? *See p. 16.*
- Will the MOU involve sharing information that a non-federal party may consider to be proprietary? *See p. 17.*
- Does the MOU indicate that EPA is establishing, or actively participating in establishing, a corporation? *See p. 17.*
- Does the MOU create the appearance that EPA is establishing or participating in a *de facto* organization? *See p. 18.*
- Does the MOU contemplate that an EPA official will serve on the Board of Directors or a similar body that governs a non-federal organization? *See p. 18.*
- Does the MOU imply that EPA endorses the purchase or sale of commercial services or products? *See p. 19.*
- Does the MOU contemplate activities that are intended to benefit certain individuals *because of* their race or certain entities *because of* the race of their stakeholders (e.g., students, constituents, members)? *See p. 19.*
- Does the description of activities in the MOU raise issues under the Federal Advisory Committee Act? *See p. 20.*
- Does the Paperwork Reduction Act apply to activities under the MOU? *See p. 20.*

*See Appendix for OGC attorney contact information.

QUESTIONS TO ASK WHEN PREPARING OR REVIEWING AN MOU

Appropriateness of an MOU

1. Is an MOU the appropriate instrument to use to accomplish the Agency's objectives?

When reviewing a draft MOU or communicating with a program office regarding a planned MOU, it is important to consider whether an MOU is the proper vehicle for the intended activity. For example, if the program office wants to accept funds or in-kind resources from outside parties for conducting research and development, the appropriate vehicle may not be an MOU but rather a Cooperative Research and Development Agreement (CRADA) authorized by the Federal Technology Transfer Act. Similarly, if the activity contemplates the transfer of funds from an EPA program office to a non-federal party, using an MOU would not be appropriate; rather, the Agency's procedures for awarding financial assistance and contracts, which generally require open competition, would apply. Further, the appropriate vehicle for transferring funds to another federal agency is an interagency agreement rather than an MOU.

Contact Office: OGC or ORC contact attorney to be determined on a case-by-case basis, depending on the subject matter of the MOU.

Title

2. How should the MOU be titled?

It is important to remember that the title of an MOU is not, in and of itself, determinative of its legal effect. Although the title may provide evidence of the signatories' intent, it is the substantive terms of the MOU that are generally determinative of an instrument's legal effect. Regardless, however, the title should be carefully considered and selected to reflect the parties' legal intent.

Contact Office: OGC or ORC contact attorney to be determined on a case-by-case basis, depending on the subject matter of the MOU.

Delegation 1-11

3. If the MOU is with another federal agency; a state, tribal, or local government; or foreign government, has the program office coordinated with the Grants or Regional Grants Management Officer?

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Ex. 5 Attorney Client (AC)

OGC Contact Office: Civil Rights and Finance Law Office (CRFLO)

4. Does the MOU involve Indian tribes?

MOUs involving Indian tribes may raise special issues due the unique legal status of federally-recognized Indian tribes and the federal government's trust relationship with them.

OGC Contact Office: Cross-Cutting Issues Law Office (CCILO)/Communities & Ecosystems Practice Group

5. Does the agreement involve a foreign government or entity or involve international efforts to promote environmental protection?

Ex. 5 Attorney Client (AC)

Ex. 5 Attorney Client (AC) Some cooperative efforts may also be authorized pursuant to other U.S. law, including international agreements to which the United States is a party.

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Given the unique aspects of an international MOU, CCILO's International Environmental Law Practice Group (IELPG) should be contacted in all cases where such an MOU is concerned.

OGC Contact Office: CCILO/International Environmental Law Practice Group (IELPG)

General Structure and Content

6. Is the purpose of the MOU clearly explained?

It is important for all involved to have a clear understanding of what is intended to be accomplished through an MOU. Therefore, the purpose of an MOU should be set forth clearly and concisely, either in a "Purpose" section or in some other way.

Contact Office: OGC or ORC contact attorney to be determined on a case-by-case basis, depending on the subject matter of the MOU.

7. Does the MOU provide the necessary context/background?

As a general matter, an MOU should at least briefly explain its context (e.g., events leading up to the MOU and/or the basis for each signatory's interest in the activities called for in the MOU), in a "Background" section or included in another appropriate provision.

Contact Office: OGC or ORC contact attorney to be determined on a case-by-case basis, depending on the subject matter of the MOU.

8. Does the MOU describe EPA's authority to undertake the activities described in the MOU?

An MOU should state the statutory provision(s) or other relevant provisions (e.g., international treaty) that provide EPA with the authority to undertake the activities described in an MOU.

Listed below are examples of statutes that authorize EPA to carry out voluntary programs to promote environmental protection. These statutes are provided as examples only.

There may be other statutes, regulations, treaties, etc., that provide EPA with the relevant authority.

A. General

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B. International

Ex. 5 Attorney Client (AC)

C. Media-Specific

Ex. 5 Attorney Client (AC)

Ex. 5 Attorney Client (AC)

D. Program-Specific Authorities

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Contact Office: OGC or ORC contact attorney to be determined on a case-by-case basis, depending on the subject matter of the MOU.

9. Does the MOU set forth in a clear and concise manner the actions each party intends to undertake pursuant to the MOU?

An MOU should clearly and concisely state what each party is expected to do, individually or together, under the MOU. The specific level of detail in this regard should be determined on a case-by-case basis.

Contact Office: OGC or ORC contact attorney to be determined on a case-by-case basis, depending on the subject matter of the MOU.

10. Does the MOU contain mandatory language or other provisions that create, or appear to create, binding legal obligations?

Although some provisions of an MOU may be intended to establish a new, legally binding commitment, MOUs for EPA purposes are generally intended to be primarily aspirational in nature. **Therefore, it is important that the language used in an MOU be considered carefully so as to ensure that it reflects the parties' intent to be bound or not bound by a specific provision.**

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Ex. 5 Attorney Client (AC)

¹ See, e.g., Total Medical Management v. U.S., 104 F.3d 1314 (Fed. Cir. 1997), in which the U.S. Court of Appeals for the Federal Circuit found the MOU at issue to have all of the basic elements of a contract, and therefore be indicative of an intent to be legally bound, notwithstanding the parties' intent (MOU between United States and private health care company could bind the U.S. in contract).

Ex. 5 Attorney Client (AC)

This does not mean that “mandatory” terminology may never be used in an MOU since there are, in fact, specific instances where such terminology may be warranted (e.g., where such language is being used to recite an existing legal duty or where a third party is agreeing to grant EPA a copyright license).⁴ Rather, this Checklist is intended only to highlight the potential legal risk associated with the use of “mandatory” terminology in those instances where the parties do not wish to be legally bound. In such instances, and to the extent practicable, “non-mandatory” terminology should be used in an MOU.

Ex. 5 Attorney Client (AC)

If a reviewer has any doubt or question about whether to include mandatory terminology in an MOU, that reviewer should err on the side of caution and contact CCILO.

OGC Contact Office: CCILO

Ex. 5 Attorney Client (AC)

11. Does the MOU contain the appropriate “no private right of action” language?

Each MOU should contain a statement that the MOU does not create a private right of action by a non-party.

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OGC Contact Office: General Law Office (GLO)

12. Does the MOU provide for its commencement, duration, modification, and termination?

Even though primarily or, in some cases, entirely aspirational in nature, all MOUs should provide for their commencement, duration, modification, and termination.

Ex. 5 Attorney Client (AC)

Ex. 5 Attorney Client (AC)

OGC Contact Office: CCILO

There may be provisions in an MOU that the parties agree should continue after the agreement terminates, such as licenses of intellectual property and treatment of confidential information. In that case, the reviewer should consider inserting a survival clause

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Ex. 5 Attorney Client (AC)

Financial Provisions

- 13. Does the MOU purport or appear to obligate funds? Does the MOU provide for compliance with appropriations law and Agency policies relating to competition for grants and contracts?**

Agency officials signing MOUs must ensure that the document they are signing does not obligate appropriated funds or otherwise make a legally binding commitment to expend EPA resources in order to comply with the Antideficiency Act, 31 U.S.C. 1341 and 1342, the Recording Statute, 31 U.S.C. 1501, and Subpart 1.6 of the Federal Acquisition Regulation governing unauthorized commitments of funds.

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OGC Contact Office: CRFLO

14. Does the MOU create the appearance that federal agencies are jointly financing a commission, board, or similar organization to carry out governmental responsibilities?

Ex. 5 Attorney Client (AC)

Ex. 5 Attorney Client (AC) if a reviewer believes there is an issue in this area, the reviewer should contact CRFLO's Claims, Property, and Appropriations Law Practice Group leader.

OGC Contact Office: CRFLO

15. Does the MOU include an indemnification provision?

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OGC Contact Office: CRFLO

Intellectual Property/Trademark Issues

16. Is it possible that the activities described in the MOU may create intellectual property?

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Ex. 5 Attorney Client (AC)

OGC Contact Office: GLO/IPLPG

17. **Does the MOU authorize, or imply, that a party may use the EPA seal or identifier (logo)?**

The Agency's official seal and identifier may only be used for official purposes. They may not be used to promote commercial products or services.

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Ex. 5 Attorney Client (AC)

OGC Contact Office: GLO/IPLPG

18. **Does the MOU authorize a party to use a program name or logo used by the Agency?**

The reviewer of an MOU needs to carefully examine the MOU for any possible use of an Agency program name or logo, or the creation of a new named program initiative. This is most likely to occur when the MOU involves an Agency voluntary partnership program. Any agreement involving a voluntary partnership program, or any agreement proposing the use of a name or logo whether owned or created by the Agency or another party, should be reviewed by GLO/IPLPG.

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OGC Contact Office: GLO/IPLPG

Confidential Business Information

19. Will the MOU involve sharing information that a non-federal party may consider to be proprietary?

Ex. 5 Attorney Client (AC)

OGC Contact Office: GLO

Outside Organizations

20. Does the MOU indicate that EPA is establishing, or actively participating in establishing, a corporation?

Ex. 5 Attorney Client (AC)

OGC Contact Office: CRFLO

21. Does the MOU create the appearance that EPA is establishing or participating in a *de facto* organization?

Some MOUs establish organizations that, while not officially incorporated, function or appear to function as independent legal entities. These organizations are often characterized as “associations” or “partnerships.”

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Ex. 5 Attorney Client (AC)

Note that although it is permissible for EPA to cooperate with public and private organizations on matters of mutual interest to encourage and coordinate efforts to protect human health and the environment, the Agency participates in these efforts in its capacity as a federal agency and not as a “partner” in the legal sense of sharing assets and liabilities with other signatories to the MOU.

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Ex. 5 Attorney Client (AC)

OGC Contact Office: CRFLO

22. Does the MOU contemplate that an EPA official will serve on the Board of Directors or a similar body that governs a non-federal organization?

Ex. 5 Attorney Client (AC)

Endorsements

23. Does the MOU imply that EPA endorses the purchase or sale of commercial services or products?

Ex. 5 Attorney Client (AC)

Civil Rights Issues

24. Does the MOU contemplate activities that are intended to benefit certain individuals *because of* their race or certain entities *because of* the race of their stakeholders (e.g., students, constituents, members)?

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OGC Contact Office: CRFLO/Civil Rights Practice Group

Other Potential Legal Issues

25. Does the description of activities in the MOU raise issues under the Federal Advisory Committee Act?

Ex. 5 Attorney Client (AC)

OGC Contact Office: CCILO

26. Does the Paperwork Reduction Act apply to activities under the MOU?

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OGC Contact Office: CCILO

Conclusion

As previously indicated, this Checklist is intended to serve as guidance regarding the review of MOUs and other similar, generally aspirational, cooperative agreements (e.g.,

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Memoranda of Agreement, Joint Statements of Cooperation, Statements of Intent, Letters of Intent). This Checklist is not intended, however, to be all inclusive; rather, it is intended to provide general guidance on those issues most frequently raised in the MOU context. Additionally, this Checklist provides the relevant OGC office and attorney contact information.

APPENDIX
OGC ATTORNEY CONTACT INFORMATION
06-08-08

Contact for Questions 10, 12, and Other General MOU Issues

- *Jocelyn Adkins, OGC/CCIO:* 202/564-5424; [[HYPERLINK](mailto:adkins.jocelyn@epa.gov)
"mailto:adkins.jocelyn@epa.gov"]

Contact for Questions 3, 12-15, 20-21, and Other Finance Law Issues

- *Lucille Liem, OGC/CRFLO:* 202/564-5699; [[HYPERLINK](mailto:liem.lucille@epa.gov)
"mailto:liem.lucille@epa.gov"]

Contact for Questions 12, 22-23, and Other Ethics Issues

- *Peggy Love, OGC/Ethics:* 202-564-1784; [[HYPERLINK](mailto:love.peggy@epa.gov)
"mailto:love.peggy@epa.gov"]

Contact for Question 24 and Other Civil Rights Issues

- *Tanya Lawrence, OGC/CRFLO/CRPG:* 202-564-2916; [[HYPERLINK](mailto:lawrence.tanya@epa.gov)
"mailto:lawrence.tanya@epa.gov"]

Contacts for Questions 11-12, 16-18, and Other Intellectual Property Issues

- *Geoffrey Cooper, OGC/GLO/IPLPG:* 202/564-5451; [[HYPERLINK](mailto:cooper.geoffrey@epa.gov)
"mailto:cooper.geoffrey@epa.gov"]
- *Kathleen Coleman, OGC/GLO/IPLPG:* 202/564-5449; [[HYPERLINK](mailto:coleman.kathleen@epa.gov)
"mailto:coleman.kathleen@epa.gov"]

Contact for Question 4 and Other Issues involving Indian tribes

- *Tim McLaughlin, OGC/CCIO/C&EPG:* 202/564-5557; mclaughlin.tim@epa.gov

Contact for Question 5 and Other International Issues

- *Jocelyn Adkins, OGC/CCIO/IELPG:* 202-564-5424; [[HYPERLINK](mailto:adkins.jocelyn@epa.gov)
"mailto:adkins.jocelyn@epa.gov"]

Contact for Question 19 and Other Information Issues

- *Geoffrey Cooper, OGC/GLO:* 202-564-5451; [[HYPERLINK](mailto:cooper.geoffrey@epa.gov)
"mailto:cooper.geoffrey@epa.gov"]
- *Kathleen Coleman, OGC/GLO:* 202-564-5449; [[HYPERLINK](mailto:coleman.kathleen@epa.gov)
"mailto:coleman.kathleen@epa.gov"]

Contact for Question 25 – Issues involving the Federal Advisory Committee Act

- *Marilyn Kuray, OGC/CCIO:* 202/564-3449; [[HYPERLINK](mailto:kuray.marilyn@epa.gov)
"mailto:kuray.marilyn@epa.gov"]

Contact for Question 26 – Issues involving the Paperwork Reduction Act

- *David Coursen, OGC/CCIO:* 202/564-0781; [[HYPERLINK "mailto:coursen.david@epa.gov" \]](mailto:coursen.david@epa.gov)